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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1469

ERNEST W. LOHF, as Trustee
in Bankruptcy of SUDLER, HART & CO.,
doing business as Sudler & Co.,

Petitioner,

AGAINST

THE TRAVELERS INDEMNITY COMPANY,
an insurance company organized under the
laws of the State of Connecticut,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT COURT

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THE QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals in this diversity case failed to follow (a) controlling Colorado law, and (b) prior decisions of the Supreme Court of the United States in holding that the trustee of a bankrupt securities broker-dealer was precluded from indemnity of fidelity losses under a broker's blanket bond because (1) no sworn proof

of claim was furnished to the insuror, and (2) the
did not waive its right to a sworn proof of claim
there a waiver of any other bond conditions, notwit
ing that the insuror responded to the trustee's cla
a blanket denial letter.[1]

STATEMENT OF THE CASE

In this diversity action[2] the trustee in bankru
Sudler, Hart & Co.[3] seeks indemnification from Th
elers Indemnity Company[4] for losses arising out
fraudulent, dishonest or criminal acts of Sudler'
dent, Richard Kirby Hart. Such indemnification is
pursuant to the issuance in 1967 by Respondent
tioner of an indemnity bond assertedly covering, *in*
the aforementioned acts.[5]

The developed factual record would reflect th
its adjudication as a bankrupt on September 2
Petitioner was engaged in business in Colorad

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[1] Respondent would respectfully restate Petitioner's Ques
sented for Review because in its Order upon the pe
rehearing the Tenth Circuit Court of Appeals stated quit
tically that:

> Appellant [Petitioner herein] all along has argued
> waiver theory, and all along we have rejected it.
> December 16 letter is a blanket denial of coverage;
> **is, coverage is denied under all the conditions of**
> **bond including failure to furnish an itemized proo**
> **loss . . .** (Emphasis added)

See Appendix B at B-1, B-2, Petitioner's Petition for
Certiorari [hereinafter all references to matters contained
tioner's Appendix will be cited as Appendix].

[2] This instant action was commenced in the District Court
Colorado on September 10, 1971. Upon Respondent's mo
suit was removed to the United States District Court
District of Colorado. 62 Stat. 930 (1948), 28 U. S. C. Sec. 1

[3] Hereinafter sometimes referred to as Petitioner or Sudl

[4] Hereinafter referred to as Respondent.

[5] However, the issued bond "expressly excludes any loss
directly or indirectly from the acts of members of the
Directors." Appendix at A-2. In this regard, "Richard K
was the actual or beneficial owner of 98% of the issu
and was also the "president and chairman of the board"
Hart & Co. Appendix at C-2.

registered securities broker and dealer. Upon subsequent examination into the affairs of Sudler by the appointed trustee in bankruptcy, it was discovered that between January 8 and September 26, 1969, the bankrupt sustained losses ($684,143.68) through the dishonest, fraudulent or criminal conduct of Sudler's president.

On September 25, 1970, Petitioner first gave written notice to Respondent of losses claimed to be covered under and to the limits of the bond.[6] Respondent, by letter dated December 16, 1970, denied any liability under such bond. The factual posture would further reflect that Petitioner has not, to this date, submitted an itemized proof of claim duly sworn to; nor has Petitioner requested an extension of time within which to file such proof of claim; nor has Petitioner compiled with other pertinent bond terms.[7]

The District Court upon a stipulated record entered a Judgment of Dismissal in Respondents's favor. In its opinion denying liability the trial court specifically found "that the letter of December 16, 1970, written by one of

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[6] "Because the bond's coverage was limited to $50,000 the trustee demanded indemnification for only the last two fraudulent checks written by Hart." Appendix at A-3.

[7] The Tenth Circuit Court of Appeals found that:

> **Without question, the trustee did not follow all the bond's terms when demanding indemnification.** Section three of the bond requires that '[t]he Insured **shall give to the Underwriter written notice of any loss** under this bond as soon as possible after the Insured shall learn of such loss, and within ninety days after learning of such loss shall file with the Underwriter an itemized proof of claim duly sworn to.' The earliest Travelers received written notice of the loss was on September 25, 1970, when the trustee sent Travelers a copy of the complaint he had filed against Hart in an independent civil action. This notce was given a year after the bankruptcy petition was filed and nearly eleven months after the trustee was appointed. For some unexplained reason the **trustee also failed to submit an itemized proof of claim duly sworn to as required by the bond.** Section three of the bond, above quoted, certainly was not complied with (Emphasis added)
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> **Appendix at A-4.**

defendant's assistant claims supervisors, was not a waiver of available defenses of lack of coverage."[8]

On appeal, the Tenth Circuit Court of Appeals affirmed the dismissal by the trial court, but did so for "reasons not considered in the court below."[9] The Court of Appeals only rejected "the lower court's conclusion that Hart stole the money in his capacity as a corporate director,"[10] while holding that Petitioner failed to comply with certain pertinent conditions precedent under the terms of the bond.

In its order denying the petition for rehearing, the Court of Appeals dismissed Petitioner's waiver theory based on the December 16, 1970, letter stating "Appellant all along has argued this waiver theory, and all along we have rejected it."[11] The Court of Appeals was also clear in pointing out that Respondent had denied coverage "under all the conditions of the bond including failure to furnish an itemized proof of claim within ninety days after learning of such loss."[12]

ARGUMENT

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE IS ENTIRELY CONSISTENT WITH THE LAW AS ANNOUNCED IN THE STATE OF COLORADO

At the outset, Respondent strongly submits that the present case is not a proper matter for review since the Court of Appeals' decision was not rendered in contra-

[8] *Id.* at C-8. *See also* 16 Appelman, Insurance Law and Practice, Sec. 9083; Couch on Insurance, 2ed., Sec. 71:22.

[9] *Id.* at A-3.

[10] *Id.* at A-4. *Compare,* **Frank Gardner Hardware & Supply Co. v. St. Paul Fire & Marine Ins. Co.** 245 Miss. 321, 48 S.2d 190 (1963).

[11] *Id.* at B-1.

[12] *Id.* at B-2

diction of established Colorado law.[18] In fact, the instant opinion clarifies and reiterates the propriety of Colorado law on the matter.

The main thrust of Petitioner's argument again centers around his propounded waiver theory. In other words, Petitioner is saying that Respondent excused the trustee from filing a proof of claim when Respondent waived its right to performance. Petitioner misplaces his emphasis by ignoring the findings of the Court of Appeals and the District Court.

A.

First, the trial court considered Petitioner's claim of waiver; elicited testimony on the issue; developed the factual posture and coupled with the stipulated record stated:

> It is on this letter that plaintiff rests his claim of waiver by defendant of all of the foregoing affirmative defenses. It is a little difficult to follow plaintiff's argument, but it seems to boil down to a contention that the brief letter of December 16, 1970, was an intentional or implied waiver of all defenses, other than the defense of date of loss and its discovery. Defendant's witnesses testified in effect that the intent of the letter was to say only that no covered losses were sustained and discovered, and that there was no intent to waive other defenses. *We think that it takes a strained reading of the December 16, 1970, letter to arrive at any conclusion that it constitutes a waiver of manifestly valid defenses under the bond—defenses which plaintiff admits are perfectly good* unless this faint claim of waiver can be sustained. Plaintiff relies on *Federal Life Ins. Co. v. Wells*

[18] Rule 19 1.(b), Sup. Ct. R.

(1936) 98 Colo. 455, 56 P.2d 936, to support his argument that there was a waiver. This case is inapposite . . . . (Emphasis added)[14]

The trier of fact, in this instance the trial court, determined, upon the evidence, that there was no waiver as claimed.[15] *It was specifically found that Respondent did not deny liability on one ground to the exclusion of other valid defenses.*[16] In this light, denial of Petitioner's waiver theory is totally consistent with Colorado law.

B.

Secondly, although the Court of Appeals did not specifically mention the failure of Petitioner's waiver theory in its opinion, due consideration by the court was obviously given to that issue. This is amply evidenced by the Appellate Court's pronouncement in its Order denying the petition for rehearing.[17] The court was clear in saying

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[14] Appendix at C-5-C-6.

[15] In **Capitol Fixture & Supply Co. v. National Fire Ins. Co.**, 131 Colo. 64, 68, 279 P 2d 435, 437 (1955), a case relied upon by the Court of Appeals, the Colorado Supreme Court stated that:

> The trial court found, and there is no evidence to support any other finding, that, 'The insurance company **has not by its conduct, or otherwise, waived full compliance by the policy holders of all conditions** of the policies.' (Emphasis added)
>
> • • •
>
> The Court also said that:
>
> The submission of proof of loss within sixty days from the inception of the loss is a specific provision of the policy; is a condition precedent to liability on the part of the insurer; and it is the generally accepted rule that the failure to comply wih such requirements within the stipulated time does not void the policy, provided a satisfactory excuse for noncompliance or the delay is given.

[16] Petitioner cites numerous Colorado cases which allegedly substantiate his position. *See* Petitioner's Petition, n. 8-12. However a close reading of those opinions strengthens Respondent's case. In each of the cited cases, the insurance carrier denied liability on certain grounds to the exclusion of otherwise valid defenses. *See e.g.*, **Federal Life Insurance Company v. Wells**, 98 Colo. 455, 56 P 2d 936, 938 (1936), wherein a waiver was effectuated because the court found that the carrier had based its denial of recovery upon one ground only.

[17] *Supra*, n.1.

that liability was "denied under all the conditions of the bond including failure to furnish an itemized proof of loss . . . ."[18]

As Petitioner points out, the authorities relied upon by the Court of Appeals do clearly reflect Colorado law in that "circumstances may excuse an insured from providing a formal proof of claim."[19] Here, *without question* there was no excuse, nor was one proffered, for the Petitioner's failure to comply with the proof of loss provision. In fact, "the trustee has admitted he failed to comply"[20] with that contractual provision.

However, contrary to Petitioner's stand, those authorities also indicate that contractual provisions may be waived. But a waiver to be effective must come within the parameters established by the law of Colorado.[21] Without belaboring the point, it further appears to Respondent that Petitioner has ignored the factual findings, which evidenced that no waiver was effectuated in this suit in order for the conditions precedent to be abrogated.

Respondent contends that the Court of Appeals properly and fairly applied the law of Colorado in this action. The decision reached was consistent with and based upon state law; wherefore, Petitioner has failed to show sufficient cause why this matter should be reviewed by this Court.

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[18] Appendix at B-2.

[19] Petitioner's Petition at 8. *See* also Appendix at A-5.

[20] Appendix A-5.

[21] *See* n. 15 and 16, *supra*. *See* also **Boaz v. Order of Commercial Travelers of America**, 69 Colo. 44, 168 P. 1178, 1179 (1917), wherein the Colorado Supreme Court stated:

> The doctrine of waiver is based upon the manifest injustice of permitting a party by his acts to mislead another, so that the latter is induced to assume the expense and labor of the trial of an issue tendered, and then be met with a plea that because of something done, or omitted to be done, of which the first party all the time had knowledge, such issue is wholly immaterial.

See also **Hartford Livestock Insurance Co. v. Phillips**, 150 Colo. 349, 372 P.2d 740 (1962).

CONCLUSION

For the reasons set forth herein, Respondent res
fully requests that the Petition for Writ of Certiora
denied.

Respectfully submitted

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